REPORT
of the
ATTORNEY GENERAL'S ADVISORY COMMITTEE
on an
INTERNATIONAL ARBITRATION CENTRE

January 1988

Attorney General's Advisory Committee on An International Arbitration Centre

FINAL REPORT

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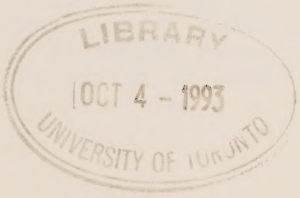

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The Arbitration Centre should operate at arm's length from the court system, to emphasize that arbitration is not simply litigation under a different name. This principle is more important than the source of funds or the ultimate administrative authority.

INTRODUCTION

On May 12, 1986, the Attorney General announced to the Legislature that he was appointing an Advisory Committee to review a need for an International Commercial Arbitration Centre in Ontario, together with its logistical and financial requirements. On the same day, British Columbia opened an international commercial arbitration centre in Vancouver. The Province of Quebec had announced plans to open an arbitration centre in Quebec City, in January, 1987. In this context, the Committee was asked whether Ontario should in its turn establish such a centre.

The Committee was composed of six people from the private sector with experience in arbitrations. Four were lawyers: David Bristow of Bristow, Gilgan and Glaholt, William Graham of the Faculty of Law, University of Toronto, Chris Paliare of Gowling and Henderson and Martin Teplitsky of Teplitsky, Colson, Stone. Edward Chick is Vice President, Claims of Royal Insurance Company and Paul B. Walters is an engineer who heads his own consulting firm. The latter two and Professor Graham are active members of the Arbitrators' Institute of Canada. In addition, John Gregory of the Policy Development Division and Patrick Monahan of the Minister's personal staff participated in the Committee.

The Committee met three times, in August and December, 1986 and in April 1987. Between meetings, its members reviewed documents on international arbitration centres in Canada and elsewhere, devised and circulated to selected respondents a questionnaire on the demand for an arbitration centre, and individually took other initiatives and made other suggestions that are reflected in this report.

The comments and recommendations made in this report are, unless otherwise noted, the unanimous views of the members of the Committee.

ARBITRATION

Arbitration is a method of resolving disputes privately, which is to say outside the public courts. The parties to a dispute may agree to resolve it by arbitration rather than by a lawsuit, in which case they select one or more arbitrators and a place for the arbitration and agree on the rules that will govern the proceedings. Most arbitrations in Ontario are carried out under the authority of the Arbitrations Act, R.S.O. 1980 c. 25, which provides a very basic framework and which makes provision for enforcement of arbitral awards through the courts if the parties do not comply voluntarily.

Parties to disputes may prefer to arbitrate rather than to go to court for many reasons. Arbitration may be faster than litigation simply because hearings can be held at the convenience of the parties. The parties choose the person who will adjudicate their dispute, which may benefit them in the arbitrator's experience, expertise and temperament. The rules and proceedures of arbitration, being within the control of the parties, may be more flexible and convenient than the rules of civil procedure. Arbitration is a private process, so one does not parade the details of one's dispute in public. While arbitration is sometimes said to be less acrimonious than litigation, this may depend more on the character of the parties and their counsel than on the process they have chosen to resolve their differences. Finally, arbitration may be cheaper than litigation, largely because it is faster and simpler, even though the parties must pay for an arbitrator and the site of the arbitration, which they do not do in the case of a lawsuit.

People may resort to private arbitration to resolve any dispute that does not have an element of public interest to it. Criminal charges or questions relating to civil rights or the allocation of social benefits are largely inappropriate to private arbitration. The most common kind of arbitration in Ontario is almost certainly labour arbitrations conducted to resolve disputes under a collective agreement. The law requires that these disputes be arbitrated rather than made the subject of litigation. Commercial arbitrations to resolve business disputes are more common in some industries than in others. They are common in the construction industry, as they allow disputes to be resolved by experts without necessarily delaying the progress of construction. Insurance companies use arbitration among themselves to resolve questions of liability for contributions to payments.

A small number of arbitrations take place under the provisions of certain statutes such as the Condominiums Act, or the Minicipal Arbitrations Act.

Because arbitrations are by their nature private, no one knows exactly how many occur in Ontario. Nevertheless, it appears safe to say that their number will increase in the future. Both the public and the legal profession are searching for alternatives to the delays and expenses of traditional litigation, and arbitration is perhaps the best known. The Rules of Practice that came into force in 1985 allow judges to refer parties to arbitration on appropriate points in litigation. It is anticipated that Mr. Justice Zuber will encourage such references to expedite the resolution of disputes and keep the courtrooms free for the type of problems which they must be used to solve.

The volume of arbitration would expand even more if the process were actively promoted, both by public authorities and by the legal profession.

Arbitration is often discussed together with mediation and conciliation, other forms of non-judicial dispute resolution. Arbitration, while private, still decides the dispute on its merits and the award binds the parties. Mediation and conciliation both involve a search for compromise solutions which are rarely binding. Public policy in favour of alternative dispute resolution will usually promote all three. Facilities to encourage or house arbitration can easily be adapted to suit mediation and conciliation as well.

INTERNATIONAL ARBITRATION

Arbitrations involving parties from more than one country or transactions that are to be performed in more than one country may be grouped together under the title of international arbitration. This report will confine itself to commercial arbitration rather than arbitration involving governments in questions of public law (although governments engaging in commercial transactions may be parties to international commercial arbitration of the type discussed here).

In international business, arbitration is a very common way to settle disputes. Besides the usual reasons for preferring arbitration, parties also seek assured neutrality of the decision maker and a familiarity with the rules of procedure to be applied in arriving at a decision. Neither is certain through the courts of every country, and the latter is even harder to come by through international litigation. Both are much more easily secured through an international arbitration agreement.

At present, about 1,100 international arbitrations occur around the world each year. A substantial percentage of these are arbitrations involving the international carriage of goods, particularly by sea. Perhaps some 700 international arbitrations are divided between the International Chamber of Commerce, principally in Paris and Geneva, and the London Court of Arbitration in London, England. Stockholm is a major site for arbitrations involving countries of the eastern bloc and western businesses. The United States, particularly New York City, attracts between 150 and 200 international arbitrations a year. The other arbitrations are spread throughout the world. There are, or will be by the end of 1987, at least 50 international arbitration centres throughout the world, most of them with very little if any international arbitration business.

The British Columbia International Commercial Arbitration Centre has not yet held an international arbitration, in the year since it opened. Hong Kong's centre has been open for two years and expects its first international arbitration in 1987.

Some people argue that Canada, and even Toronto, may have substantial advantages over many other places in attracting international arbitration business. Many Canadian businesses engage in exports, and those businesses would probably be pleased to have the chance to arbitrate at home. Canada is a neutral territory close to the United States, where European or Asian businesses dealing with the United States might prefer to arbitrate rather than in the United States itself. Because of our familiar legal system, open economy and stable political institutions,

international business may feel comfortable arbitrating here. Toronto might well expect to capture a large number of international arbitrations to be conducted in Canada, because of its legal and financial expertise and convenient location. The British Columbia centre is focusing on Pacific Rim disputes.

In the Committee's view, international arbitration does not have the potential to grow to a volume that would by itself support an arbitration centre, however defined or established. Its role would be to supplement the business of a centre specializing in arbitrations of all kinds.

RECOMMENDATION:

The Committee recommends that Ontario not establish a centre devoted exclusively to international arbitration.

THE ARBITRATION CENTRE

After deciding that the demand for an international arbitration centre would not be sufficient, the Committee turned its attention to the demand for an arbitration centre serving all kinds of dispute. With the help of the Research Services Branch of the Ministry of the Attorney General, it designed and circulated a questionnaire on the subject to many prominent law firms, businesses and individuals interested in arbitration. All groups and companies that made individual presentations to the Slater Commission on Motor Vehicle Liability received a questionnaire. The results of the questionnaire are attached to this report as Appendix A. The report asked respondents both how many arbitrations they might bring to an arbitration centre each year and how much they would be prepared to pay for the facilities of such a centre.

The response to the questionnaire estimated a total use of between 500 and 600 days a year, and proposed a fee ranging from $150 a day up. Most respondents foresaw using the centre for commercial disputes, but matrimonial and labour arbitrations were also mentioned frequently. The same facilities can easily be used for all kinds of dispute. While this figure may show some overlap between the parties, some of whom might face each other in the same dispute, and while allowance may be made for the fact that the figures were given without any engagement on the part of those giving them, nevertheless the market survey was neither complete nor statistically representative and the figure may equally well understate the demand. These estimates were given without any effort of promotion or marketing of the centre or of the process of arbitration.

The Arbitrators' Institute of Canada foresaw up to 2,500 arbitrations a year being conducted in the centre. 1,000 would be labour arbitrations, 1,000 would be consumer and family arbitrations (perhaps when both become more developed, in two or three years), and 500 would be commercial arbitrations. Presumably all these estimates depend on a competitive rate for use of the facilities.

Most respondents approved of a suggestion that a centre should offer mediation and conciliation services as well as arbitrations. The parties may wish to try one of the latter procedures before resorting to the more formal structure of an arbitration.

RECOMMENDATION:

The Committee recommends that Ontario establish an arbitration centre or centres capable of serving local and international arbitrations of all kinds, with mediation and conciliation facilities as required.

FUNCTIONS OF THE ARBITRATION CENTRE

A number of functions have been suggested for an Arbitration Centre.

(a) Servicing arbitrations: The principal function of an arbitration centre is to provide support for the conduct of arbitrations. The Committee's questionnaire suggested many ways in which this could be achieved, and most respondents were positive about all the choices proposed. The administration of a centre should be able to book hearing rooms and make travel and accommodation arrangements for those coming from out of town. It should be able to coordinate schedules for all concerned. In addition, a centre should offer secretarial assistance, translation services (especially for international arbitrations), reporting and recording services, probably computing services and a small library. It would be convenient for the centre to offer house rules for conduct of arbitration, although parties must be free to select their own rules instead, to the extent allowed by law.

The most far-reaching decision to be made about services is whether the centre should provide hearing rooms, or simply arrange for the use of rooms elsewhere in town. The Quebec arbitration centre does not itself provide hearing rooms, but it maintains a list of suitable sites and will reserve them for the parties on request. Such a centre is considerably cheaper to establish than one which provides the space for hearing rooms and the necessary concomitants, such as conference rooms, retiring rooms for witnesses, counsel chambers and the like.

Three arguments support providing rooms and the related facilities, to cover at least some of the anticipated demand for arbitration space. First, a "full service" arbitration centre would be more credible and more likely to attract users than a centre that resembled a glorified tourist bureau. The centre should provide something that the parties can see cannot be done by their own secretaries. Second, the role of the arbitration centre in promoting arbitration as a form of dispute resolution can be accomplished much better if arbitrations can be seen to be happening at the centre. An arbitration centre is to some extent a competitor, even if a benign competitor, of the courts. A series of hearing rooms publicly identified as an arbitration centre is more likely to draw people to it than a switchboard and a computer. Third, the main service for which people are likely to be prepared to pay is the rental of a hearing room and related facilities, and therefore the best way for an arbitration centre to pay for itself is to provide these rooms. Whether it charges an additional fee for the coordination of arrangements is an open question.

(b) Promoting arbitration: An important function of the Arbitration Centre would be to serve as a highly visible advertisement for arbitration as an alternative to litigation. As such, it must be conveniently located and actively publicized. It would be appropriate for the centre to sponsor promotional courses about arbitration. Generally speaking, it must make arbitration as easy to use as possible. In turn, of course, the growth of arbitration would help ensure that the arbitration centre itself remained busy.

(c) Education and research about arbitration: The Quebec arbitration centre is closely linked to Laval University and is promoting the study of arbitration as a method of dispute resolution, together with mediation and conciliation. It is also running courses for those interested in international and no doubt domestic arbitration. Little research has been done in Canada on the place of arbitration in resolving disputes. A close tie with the academic community could help provide arbitrators to the centre and practical questions to the academics. It could also help ensure that student lawyers learn about alternative dispute resolution and are not trained solely to rely on court proceedings.

On the other hand, the research and education functions may be costly to establish and are almost certainly done better by others than by a new arbitration centre. The type of activity required to run an arbitration facility is quite different from that required to carry on or direct or sponsor research and education. One function or the other risks being diluted by the existence of such different roles. It is arguable that if arbitration is promoted and generally popularized both through the centre and otherwise, then academic study will follow without direct involvement of the centre or its budget.

(d) Research into business and trade topics: It has been suggested that an international arbitration centre could be subsidized by carrying on research and development in the field of international finance and trade generally, which would involve promotion and education in these fields as well. While such activities might appeal to a particularly knowledgeable small group of people, it is hard to envisage how establishing a new specialized business college would help facilitate the task of an arbitration centre which would deal with only a small part of its concerns.

RECOMMENDATIONS:

The Arbitration Centre should service the conduct of arbitrations, by providing coordination services, hearing rooms, and ancillary services. It should also promote arbitration as a dispute settlement mechanism, both as carried on at the centre and otherwise. The centre should not however engage in research into arbitration or the extensive development of educational facilities. Its task should not be confused with research and development of business or trade opportunities generally, whether national or international.

ESTABLISHMENT OF THE CENTRE

An arbitration centre can be established by government alone, by government in cooperation with elements of the private sector, or by the private sector alone. The choice among these options is dictated not only by the theoretically most desirable setup but also by the practical likelihood of having the centre established at all through one method rather than another.

Opinion on these options in the questionnaire was divided. Of the individual respondents, 24 felt that an arbitration centre should be initially funded by a combination of government, business and labour, while 19 felt that an arbitration centre should be initially funded solely by government. 29 respondents felt that an arbitration centre should be a non-profit corporation and 11 thought it should be a government agency.

Even if arbitration is an alternative to dispute resolution in the courts, the Committee takes the view that an arbitration centre should not be closely related to government. It is impelled to this view by the need for privacy and flexibility in arbitrations. In particular, government should not engage in setting qualifications for arbitrators or appointing them for parties to private arbitrations. The choice of arbitrators and of rules should remain private to keep arbitration an alternative for the courts and not simply another branch of them.

To attract international arbitrations especially, it is essential that the arbitration not be seen to be the emanation of a government of the jurisdiction, especially where one of the parties is resident in that jurisdication.

There is no indication at present that any part of the private sector is willing to take the initiative in establishing an arbitration centre. The Canadian Arbitration, Conciliation and Amicable Composition Centre in Ottawa derives from an initiative of Carleton University, but it does not seem to be aggressively pursuing arbitration business. While the current state of the Arbitrations Act may discourage some people from arbitrating, the responses to the questionnaire show that this is not the principal reason for avoiding arbitration. Therefore this is almost certainly not the main impediment to private initiative in establishing an arbitration centre. In other words, revising the Arbitrations Act cannot be expected in itself to stimulate the private sector to establish a centre.

About one-half the respondents to the questionnaire felt that an arbitration centre should be initially funded by a combination of government, business and labour. Fewer

than half felt that an arbitration centre should be initially funded solely by government. If a centre is to be established with the cooperation of government and the private sector, then both the source of the initiative and the source of funds must be carefully considered. Funds from the private sector would have to be contributed voluntarily, rather than through special taxes. Obviously the public funds going into the centre would be funds collected from taxes. While fees from users of the centre would no doubt be expected to fuel the operations of the centre, they could not be expected to provide start-up costs, both because of their amounts and because of their timing.

A centre to be funded by public and private sector together would therefore call in the early stages for some form of fundraising. A recent example of successful fundraising of this sort is in the financing of the domed stadium in Toronto. A government may offer an incentive or matching grant that would be provided on condition that private funds were forthcoming to a certain amount. Determining the mechanics of the fundraising is less important at this stage than recognizing its necessity.

One member of the Committee has made preliminary enquiries of a real estate broker, who did not discourage the idea that a developer might provide space in a downtown office building for free or at a nominal rent. Other possible users of an arbitration centre, such as insurance companies, might possibly be prepared to provide the furnishings of a centre. Some form of public recognition associated with the centre could be provided in return for such donations. Naturally the independence of the arbitrations must not be threatened by any private assistance, either in fact or appearance.

Labour interests would most certainly be less enthusiastic about helping fund an arbitration centre. Arbitrations are common, indeed compulsory, in labour relations matters. They happen frequently and cheaply in existing premises, which do not have to be particularly or specially adapted to arbitrations. While an arbitrationn centre, once established, might attract labour arbitrations among others, it is not clear that those who are involved in labour arbitrations at present feel the lack of such a centre as much as those interested in other kinds of arbitration, particularly commercial arbitration.

The third possibility for establishing a centre is for government to do it alone. The government of British Columbia provided all the funds for the establishment of the British Columbia International Commercial Arbitration Centre, amounting to about $800,000 in the first three years (an amount which may have to be supplemented.) The

International Arbitration Centre in Quebec City has been funded largely by the Quebec government ($600,000) and the federal government ($200,000), with additional assistance from the City of Quebec ($65,000) and the Society of Notaries of Quebec ($10,000). The amount required depends of course both on the facilities to be provided (British Columbia has two hearing rooms and associated space; Quebec has no hearing rooms) and the luxury of the appointments. A different standard of comfort would be required to attract international commercial arbitrations than would be needed to be competitive with existing facilities for labour or consumer arbitrations. Every part of the Arbitration Centre need not display the same standard of furnishings.

An arbitrationn centre would almost certainly have to be located in the downtown financial core of Toronto, for the convenience of parties and counsel and for high visibility as an alternative to the courts. The centre could have the capacity to book arbitration sites elsewhere in town or out of town on request.

RECOMMENDATION

The funding of the Arbitration Centre should be ensured by the government, with assistance from the private sector where possible. Its furnishings should be designed to be competitive with other facilities for the kinds of arbitrations to be conducted in the centre.

OPERATIONS

The Arbitration Centre would facilitate arbitrations by coordinating timetables, booking hearing rooms and support staff - stenographers, reporters, translators - and providing lists of arbitrators. What it does in addition may depend on the level of its business, which in turn depends on how it is marketed. Whether the centre itself should have the responsibility of marketing arbitration as a process, as well as its own facility, is an open question. The executive director of the British Columbia centre spends a lot of time marketing in the interests of the centre.

In any event, the number of full-time staff needed to operate the centre would be comparatively low, depending of course on the volume of business.

The Committee received a detailed suggestion from the Arbitrators' Institute of Canada concerning the physical setup of the Arbitration Centre in Toronto. The specific suggestions are attached as an appendix to this report. While the Committee does not adopt the suggestions as its own, nevertheless the estimates seem to be a reasonable indication of facilities that would be useful. The AIC recommended total square footage at the outset of about 7,700 square feet. At prevailing market rents in Toronto, such a space might have an annual rent of between $200,000 and $350,000. One-time start up costs may be reducible by redesigning the centre or by effective negotiations with possible landlords.

INDEPENDENCE FROM GOVERNMENT

The Arbitration Centre could be run as a branch of government or as an entity independent of government. In both British Columbia and Quebec it is a non-profit corporation without share capital. In both provinces the Board of Directors comprises business people, academic experts in arbitration and representatives of government. The government representatives are a minority.

Of the respondents to the questionnaire, 29 felt an arbitration centre should be a non-profit corporation and 11 felt it should be a government agency. 19 felt that an arbitration centre should be run by professional persons, and 24 felt it should be run by a combination of business, labour, professional and government people. Only one respondent said it should be run by government alone.

The Committee was of two minds about the structure of the centre. One view was that the centre should be run by the government as part of the administration of justice in the province, an activity in which the government now has expertise. The other view was that the centre should be visibly independent of government, to avoid the dissatisfaction that many people felt with the traditional litigation process. The holders of both opinions agreed that an arbitration centre should be physically and operationally distinct from the courts. Those in favour of government administration acknowledged that this would be less attractive to parties to international arbitration. They argued however that the possibility of attracting a few such arbitrations should not outweigh the best interests of domestic arbitrations, which would always supply the bulk of the centre's business.

If the centre is to function at arm's length from the government, then its management must be appointed. One possibility is to hire administrators from the general labour market to operate the centre. Another possibility is to have the centre run by professionals knowledgeable in arbitration, possibly on a contract basis. This choice was explored briefly in the previous section.

The Arbitrators' Institute of Canadda has offered to operate an Arbitration Centre on a cost plus fixed fee basis. The Institute would provide management and staff for the centre, and they would in turn ensure that all the functions of the centre could be fulfilled. These operations would be an extension of what the Arbitrators' Institute does now, so the centre could be operating efficiently at an early date. The size of the staff and the contract cost would of course be negotiable. It would quickly be recoupable from the arbitration fees. (While it would not be desirable to restrict the parties' choice of arbitrators to those who were members of the AIC, such a safeguard could easily be imposed while providing for management by the Institute.)

The World Trade Centre, owned and operated by the Toronto Harbour Commissioners, is building three new buildings near the Harbour Castle Hotel. The World Trade Centre has offered to manage an arbitration centre in premises leased from the World Trade Centre in its new buildings. It has provided no more detail than that about its proposals, though it is willing to do so on request. In view of the recommendation of the Committee that Ontario should not establish a centre restricted to international arbitrations, the offer of the World Trade Centre is probably of less interest than that of the Arbitrators' Institute. The focus of activities in the World Trade Centre is naturally enough on international trade, and a centre dealing with domestic arbitrations, not only commercial but also consumer, martrimonial and even labour, would almost inevitably serve as a distraction rather than as a useful complement to that principal focus.

RECOMMENDATION

The Arbitration Centre should operate at arm's length from the court system, to emphasize that arbitration is not simply litigation under a different name. This principle is more important than the source of funds or the ultimate administrative authority.

THE NEXT STEPS

If the Ontario government decides to establish an Arbitration Centre along the lines recommended by the Committee, then it must take a number of steps to realize this project. The first is to establish a business plan for the centre, estimating its capital needs and its cash flow requirements. This will in part depend on and in part determine the strategy for funding the centre, which will influence the government's decision about the amount it is prepared to spend to establish the centre. There is no reason in principle why an arbitration centre could not be established on a small scale with potential to grow. However, if the Arbitration Centre is to serve as a kind of publicity for the process of arbitration in general, then the centre should not be obscure or known only to the initiated.

The other element in the establishment of a centre is therefore a marketing plan. The centre will be successful only if it is widely known and seen as a credible alternative to the courts, in the eyes of the public and of the legal profession. The promotion of arbitration in general can be done by the government and private sector, and indeed the Attorney General has taken significant steps in this direction with his speeches in Winnipeg and elsewhere. The report of Mr. Justice Zuber may add further weight to these arguments. Nevertheless, scepticism and inertia on the part of both lawyers and clients will not easily be overcome.

The third step is to modernize the Arbitrations Act to be as accommodating as possible to the holding of arbitrations. Opinions differ on the extent to which the apparent difficulties of arbitrating under the present Act discourage people who would otherwise go to arbitration from doing so. Nevertheless, other jurisdictions, notably British Columbia, Quebec and the federal government, have updated their governing statutes, making those jurisdictions more attractive to arbitrations. The Committee feels that Ontario should at least keep pace with those jurisdictions in the interests of providing a competitive site for arbitration and in the interests of the Ontario public who will benefit from an increase in the convenience and certainty of the arbitral process.

All of these further steps are beyond the capacities of the Committee to resolve. Members of the Committee, both individually and collectively, would however be pleased to provide their views on any plans for implementation if that is desired.

SCHEDULE 1

FACILITIES REQUIRED FOR THE ARBITRATION CENTRE

1 large main hearing room	(30' x30')	900 sq. ft.
6 smaller hearing rooms	(12' x25') 300 sq. ft. each	1,800 sq. ft.
6 Witness or conference rooms	(12' x12'5")	900 sq. ft.
Administrative offices, photocopy room, managerial offices, file storage space		1,200 sq. ft.
Entrance, waiting room, hallways		1,100 sq. ft.
Washrooms, cloakrooms, etc.		400 sq. ft.
Coffee catering service room		200 sq. ft.
	(say)	7,700 sq. ft.

** Additional space should be available in the building (although possibly used for other purposes in the interim) for additional hearing rooms as demand increases.

** Such a facility should be self-sufficient in terms of operating costs within a relatively short time.

Provided by the Arbitrators' Institute of Canada